entry decisions about whether they will use unbundled network elements or build facilities.[59]

BellSouth, however, "does not offer deaveraged rates for unbundled network elements."[60] In this regard as well, therefore, BellSouth's application is legally deficient.

3. BellSouth Appears Not To Offer Retail Services At A Wholesale Discount Based On "Avoidable" Costs.

In the Michigan Order, the FCC reiterated in no uncertain terms the interpretation it had reached in the Local Competition Order that incumbent LECs must provide retail services at a wholesale discount based on an avoidable, rather than avoided, costs standard. As the Commission explained, "[w]e will not consider a BOC to be in compliance with section 271(c)(2)(B)(xiv) of the competitive checklist unless the BOC demonstrates that its recurring and non-recurring rates for resold services are set at the retail rates less the portion attributable to reasonably avoidable costs."[61] This objective standard prevents the BOC

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59 Id.

60 Varner Aff. at ¶ 37.

61 Michigan Order at ¶ 295 (emphasis added) ("[R]esellers should not be required to compensate a BOC for the cost of services, such as marketing, that resellers perform. Moreover, just as recurring wholesale rates should not reflect reasonably avoidable costs, neither should non-recurring charges associated with the service being resold reflect costs that would be reasonably avoidable if the BOC were no longer to offer the service on a retail basis.") Id. (emphasis added); see Local Competition Order at ¶ 911 ("[W]e reject the arguments of incumbent LECs and others who maintain that the LEC must actually experience a reduction in its operating expenses for a cost to be considered 'avoided' for purposes of section 252(d)(3). . . . We

from gaming the wholesale system by artificially deflating its "avoided costs."

In its Brief, BellSouth states that it set its retail discount rate of 14.8 percent consistent with the FCC's preferred methodology -- reasonably avoidable costs -- as set forth in the Michigan Order.[62] But this statement is contradicted in two important ways. First, BellSouth's discount cost study repeatedly uses the term "avoided amount" and "total avoided costs" in arriving its proposed wholesale discount.[63] Furthermore, in its SGAT Order, the SCPSC stated that it "agree[s] with BellSouth's [discount cost] study and its calculation that relies on the Act's 'avoided' cost standard."[64] Though in its Brief BellSouth characterizes the study as an "avoidable cost discount study,"[65] the SCPSC's finding and

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therefore interpret the 1996 Act as requiring states to make an objective assessment of what costs are reasonably avoidable when a LEC sells its services wholesale.")

62 See Br. at 53 ("The Statement's discount rate of 14.8 percent . . . was established by the SCPSC in the AT&T Arbitration. Consistent with [the FCC's] preferred methodology, see Michigan Order ¶ 295, the SCPSC set its 14.8 percent discount by adjusting upward the rate indicated in an avoidable cost discount study prepared by BellSouth. Cochran Aff. ¶ 31 (App. A at Tab 2). The SCPSC reaffirmed the consistency of this discount with the Act's requirements in its [SGAT] Order at 52.")

63 See Cochran Aff. (App. A at Tab 2) at Exhibit A (emphasis added).

64 SGAT Order at 52 (emphasis added).

65 Br. at 53 (emphasis added). See Cochran Aff. at ¶ 31 (emphasis added).

BellSouth's own descriptions in the study itself belie BellSouth's assertions. At a minimum, BellSouth has provided the FCC with insufficient information to make a determination as to whether its 14.8 percent discount rate is in line with section 271(c)(2)(B)(xiv) of the Act as interpreted in the FCC's Local Competition Order and the Michigan Order.[66]

4. Prices In South Carolina Are Interim.

Although the Commission did not establish the presence of stable rates as a checklist requirement in the Michigan Order,[67] it nonetheless recognized the significance of permanent rates. Specifically, the Commission sought input as to whether rates in a state are permanent or interim. In the case of South Carolina, the rates are all interim.

Many of BellSouth's prices for interconnection and unbundled elements either fall within the FCC's now-overturned forward-looking proxy prices or are derived from those proxies.[68] An important exception is the price for two-wire unbundled loops,

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66 In its appeal of the SCPSC's BellSouth-AT&T Arbitration Order, AT&T has challenged the resale discount established in that Order on similar grounds to those described by Sprint here. See "Complaint For Declaratory And Other Relief Under The Telecommunications Act of 1996" at ¶¶ 46-49 AT&T Of The Southern States, Inc. v. BellSouth Telecommunications, Inc. et al., (D.S.C.) ("AT&T Complaint").

67 See Michigan Order at ¶ 110 n.247.

68 See Varner Aff. at ¶ 54 (central office switching), ¶ 55 (dedicated transport, ¶ 56 (shared transport), ¶ 57 (tandem switching).

which is higher in South Carolina than the proxy rate set for BellSouth by the FCC.[69] In any event, these interim pricing arrangements should not be adequate for Section 271 approval. New entrants simply cannot plan their business strategies with any level of confidence where the state Commission has not adopted a methodology for setting rates and announced prices established pursuant to that methodology. The point is not that those rates will be set in stone; indeed, the reality is that rates do in fact often change over time. But the business environment is simply too uncertain to allow efficient entry when the regulators have provided no guidance as to where they will set rates in the future. This is the case in South Carolina.

BellSouth openly acknowledges[70] that all of the prices in its SGAT are interim (where they exist at all) and will be replaced with the rates established in the SCPSC's rate proceeding.[71] Rates in the SGAT that were not derived from

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69 Compare Local Competition Order at App. D (establishing proxy ceiling recurring rate of $17.07 for two-wire unbundled loops in South Carolina), with BellSouth-AT&T Interconnection Agreement at 55, and with SGAT, Att. A at 2 (establishing recurring rate of $18.00 for two-wire unbundled loops across nine-state BellSouth region).

70 See Varner Aff. at ¶ 31 ("[A]ll rates in the Statement will be replaced by rates based on the newly filed cost studies."); Br. at 35-36.

71 On September 11, 1997, the SCPSC commenced its "Proceeding To Review BellSouth's Costs For Unbundled Network Elements." See Notice Of Filing And Hearing, SCPSC Docket No. 97-374-C. The proceeding also concerns rates for "transport and termination and certain support elements relating to network interconnection." Id. The SCPSC has scheduled a hearing in this proceeding for December 1, 1997.

approved tariffs are subject to true up, although the true up only applies if a rate decreases.[72]

Notwithstanding the fact that South Carolina has not adopted a methodology for determining rates in the state and has not set prices pursuant to that methodology, many parties have entered into interconnection agreements with BellSouth in South Carolina. ACSI was apparently unable to obtain a provision that allows for the incorporation of prices set by the SCPSC in the future in its agreement.[73] Even where such provisions have been obtained, they generally permit changes to be incorporated only when the rates are not subject to judicial or administrative review.[74] The agreements also generally permit true-ups only if the Commission explicitly requires them or BellSouth agrees to new terms either via tariff or an agreement with another CLEC.[75] As a result, the

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72 See Br. at 36; Varner Aff. at ¶ 32.

73 See BellSouth-ACSI Interconnection Agreement at Art. XVII ("Parties shall immediately commence good faith negotiations to conform this Agreement with any such [FCC, SCPSC, or other state body with jurisdiction] decision, rule, regulation or preemption").

74 See, e.g. BellSouth-Competitive Communications, Inc. Interconnection Agreement at Art. XXI (A) ("The parties agree that such [incorporation] shall take place only after all administrative and judicial remedies have been exhausted."); BellSouth-American MetroComm Corporation Interconnection Agreement at Art. XXI (A).

75 See, e.g., BellSouth-Competitive Communications, Inc. Agreement at Art. XXI (A-C) (providing for changed terms in response to: (1) a Commission directive, (2) execution of an interconnection agreement with another local exchange carrier or (3) an approved BellSouth tariff which contains

interconnection agreements in South Carolina are understandably of short duration.[76]

Rather than enter a short term agreement in South Carolina, Sprint has decided to wait and adopt (with minor changes) the terms of the agreement AT&T reached with BellSouth. The rates in AT&T's interconnection agreement will be replaced with the rates the SCPSC adopts in its permanent rate proceeding.[77] Sprint, like the other CLECs in South Carolina, has no permanent rates upon which to base an entry strategy.

BellSouth's argument that the problem of interim rates is somehow cured by the SCPSC's prohibition on upward adjustments to interconnection and UNE prices[78] is unconvincing. The central problem with interim rates is that they are much less stable than rates set pursuant to a comprehensive regulatory review. The cap on upward true-ups does not cure this problem. The uncertainty

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terms different from the carrier's current interconnection agreement.)

76 See, e.g., BellSouth-Intermedia Communications, Inc. Interconnection Agreement at Art. III(A) (two-year term); BellSouth-American MetroComm Corporation Interconnection Agreement at Art. III(A) (two-year term); BellSouth-Hart Communications Corporation Interconnection Agreement at Art. III(A) (two-year term). The Varner Aff. at ¶¶ 28, 31 indicates that all of the interim prices in interconnection agreements will be replaced with the prices set in the SCPSC rate proceeding. There is no basis provided for this statement and no indication that BellSouth will not resist adopting prices should it view them as too low.

77 See BellSouth-AT&T Interconnection Agreement at Art. 42.

78 See Br. at 36; SGAT Order at 58-59.

over any reasonable planning period remains. Further, it can be readily anticipated BellSouth (and other BOCs) will ultimately argue that the cap becomes confiscatory should the proceeding result in higher permanent rates. Litigation will then create further costs, delay and uncertainty. For any company planning to establish a permanent presence in the South Carolina local market, the amount that might be saved by entering now in reliance on the temporarily capped rates would be minuscule compared to the money at stake in the future if rates increase in the long run.

E. BellSouth Does Not Provide Interconnection In Compliance With The Commission's Rules.

Section 271(c)(2)(B)(i) establishes the checklist requirement that BOCs interconnect with CLECs for the transmission and routing of local exchange and exchange access traffic.[79] In the Michigan Order, the Commission stated that, to comply with this requirement, interconnection arrangements must be offered at TELRIC-based rates.[80] The checklist requirement for interconnection also includes the obligation imposed on all incumbent LECs by Section 251(c)(2) to provide interconnection

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79 See 47 U.S.C. § 271(c)(2)(B)(i) (requiring interconnection in compliance with Section 251(c)(2) which in turn requires incumbent LECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (A) for the transmission and routing of telephone exchange service and exchange access").

80 Michigan Order at ¶ 289.

"at any technically feasible point within the carrier's network."[81] Thus, Section 271 approval cannot be granted unless the BOC provides CLECs with any technically feasible interconnection architecture for the exchange of traffic at TELRIC-based prices. BellSouth's interconnection offering in its SGAT and the terms for interconnection provided in its interconnection agreements do not comply with these requirements.

In the supporting material attached to its SGAT, BellSouth states that it will "implement the most efficient trunking arrangement to exchange all traffic unless otherwise agreed. For purposes of this Section, 'most efficient' means the fewest number of trunks required to carry a forecasted load at P.01 grade of service."[82] In the SGAT itself, however, BellSouth only offers to allow CLECs to combine local and intraLATA toll traffic on one-way interconnection trunk groups.[83] The SGAT does not permit CLECs to combine local and intraLATA toll traffic on two-way interconnection trunk groups.[84] The SGAT also does not offer to allow CLECs to combine local, intraLATA toll and interLATA

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81 47 U.S.C. § 251(c)(2)(B).

82 See SGAT Att. C at § 14.4.1.4.

83 See SGAT at § I.D.

84 See id. ("interexchange and local traffic must be segregated prior to two way trunking").

traffic on any (one-way or two-way) interconnection trunk groups.[85]

These limited offerings are likely to force CLECs to purchase interconnection for local traffic at prices set above TELRIC. For example, the most efficient interconnection arrangement for a CLEC may be to combine local, intraLATA toll and interLATA traffic on a two-way interconnection trunk group. Absent such an offering, the CLEC would be forced to pay inefficiently high prices for the exchange of all traffic. It follows that interconnection for *local* traffic would be priced at rates above TELRIC in violation of the Commission's rules.

Nor has BellSouth claimed that it would be technically infeasible to exchange local, intraLATA toll and interLATA traffic over the same two-way interconnection trunk groups. Indeed, the SGAT includes arrangements for keeping track of toll traffic sent over the same facilities as local traffic.[86] Sprint knows of no reason why these arrangements could not be extended to apply to interLATA traffic and to traffic exchanged over two-way trunk groups. BellSouth's SGAT appears therefore not to offer all technically feasible forms of interconnection in violation of Section 251(c)(2).

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85 See id.

86 See id. at § I.A.3. ("When traffic other than local traffic is routed on the same facilities as local traffic, each company will report to the other a Percentage Local Usage").

BellSouth's interconnection agreements in South Carolina appear to suffer from similar shortcomings. The BellSouth-AT&T agreement, for example, does not permit AT&T to combine interLATA traffic with other kinds of traffic on the same interconnection trunk groups.[87] The agreement states only that the parties agree to exchange local, intraLATA toll and interLATA traffic over the same interconnection trunk groups "within twelve (12) months of industry agreement on arrangements to pass Carrier Identification Codes on all calls exchanged between two different service providers' networks."[88] In fact, however, combining all traffic on the same interconnection trunk groups is apparently technically feasible right now. In testimony before the SCPSC, AT&T's witness John M. Hamman stated that BellSouth had already agreed to "place local, intraLATA, and interLATA calls between our networks on two way trunks."[89] As Mr. Hamman explained further,

> Two way trunking is technically feasible and BellSouth has agreed to do it. All that is needed is for BellSouth to reach agreement with AT&T on the methods for separating the Percentage of Local Usage (PLU) from all of the other calls on these interconnection trunks to permit billing of the appropriate charges. Agreement on the PLU factors, however, has been delayed

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87 See BellSouth-AT&T Interconnection Agreement, Att. 2 at § 16.6.1.4 ("AT&T and BellSouth will continue to utilize existing separate two-way trunk groups for the origination and termination of interLATA traffic.")

88 Id.

89 Hamman Test., SCPSC Vol. 7 at 139.

by BellSouth by its demand to use the Bona Fide Request (BFR) Process.[90]

BellSouth appears to be preventing CLECs from interconnecting in the most efficient manner possible, not because of any technical limitation, but because it is trying to raise its rivals' costs. The Commission should therefore make it clear in this proceeding that the checklist requires that a BOC provide all forms of technically feasible interconnection to CLECs, including arrangements for the exchange of local, intraLATA toll and interLATA traffic over the same interconnection trunk groups.

II. BELLSOUTH IS INELIGIBLE FOR TRACK B, AND HAS NOT MET THE REQUIREMENTS OF TRACK A.

As explained above, BellSouth's South Carolina application is legally deficient because the BOC has failed to meet numerous checklist requirements. There is therefore no need for the Commission to reach the question of whether BellSouth's application should be considered under Track A or Track B. If the Commission nevertheless proceeds to reach the issue, however, it should consider this application under Track A. The record before the Commission demonstrates that BellSouth indeed received a number of qualifying requests from companies planning to provide competing services. South Carolina local markets are thus in the "ramp-up" period which Congress contemplated in Track A.[91] That these requesters have not yet fulfilled their

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90 Id.

aspirations in South Carolina is due to BellSouth's unambiguous refusals to comply with the law.

A. The Record Shows Substantial Interest in Entering By Numerous CLECs.

The question of whether Track A or Track B applies in a given case requires the FCC to determine whether any CLEC or combination of CLECs will eventually provide predominantly facilities-based service to business and residential customers. This inquiry requires the Commission "to engage in a difficult predictive judgment to determine whether a potential competitor's request will lead to the type of telephone exchange service described in section 271(c)(1)(A)."[92]

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91 In the Matter of Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma, CC Docket No. 97-121, *Memorandum Opinion and Order* at ¶¶ 43-46 (released June 26, 1997) (Congress recognized "that there would be a period during which good-faith negotiations are taking place, interconnection agreements are being reached, and the potential competitors are becoming operational by implementing their agreements") ("Oklahoma Order").

92 Id. at ¶ 57. In the future, such predictive judgments may also be required to determine whether the qualifying carrier status should be subsequently revoked because the circumstances warrant or because the CLEC(s) violated the terms of Section 271(c)(1)(B)(i) and (ii). These provisions require the Commission to revoke a CLEC's status as a requesting carrier if the CLEC has "(i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." 47 U.S.C. § 271(c)(1)(B)(i), (ii).

Sprint understands that several CLECs will confirm to the FCC, as does Sprint here, that they have made qualifying requests for access and interconnection such that Track A applies. This fact is readily evident in the interconnection agreements which include arrangements for resale, UNE access and interconnection for facilities-based competition.[93] These carriers are reasonably proceeding to implement these agreements in the face of appellate reversals of significant FCC decisions as well as BellSouth's continued refusal to provide interconnection on terms and conditions which the FCC has held essential. That no CLEC would order UNEs such as unbundled loops when they are being "offered" only under unlawful and uneconomic terms should be of no surprise to anyone. In any event, based upon representations made in this proceeding, the Commission can readily find Track A applicable.

B. The Commission Should Not Defer To The SCPSC's Conclusions That BellSouth's South Carolina Application Can Be Reviewed Under Track B.

Even if the FCC did not have the benefit of these CLEC confirmations upon which to conclude that Track A is the appropriate standard, a complete analysis of the record before the SCPSC alone would prompt the very same conclusion. Although BellSouth claims that the FCC must defer to the SCPSC's findings that the CLEC activity in South Carolina fails to trigger Track

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93 See e.g., BellSouth-ACSI Interconnection Agreement; BellSouth-Competitive Communications, Inc. Interconnection Agreement; Intermedia Communications, Inc. Interconnection Agreement.

A,[94] no such deference is owed. Both BellSouth and the SCPSC relied upon the absence of unequivocal statements by CLECs as the pivotal and sole factor here. But as the FCC's Oklahoma Order made clear, that factor is not sufficient by itself. The presence of a ramp-up period in which competitors have requested interconnection but have not yet become operational does not extinguish Track A applicability.

1. BellSouth's Characterization of the State Record Is Wrong And The SCPSC's Conclusions Are Not Supported By The Record.

As BellSouth itself seems to concede, there was no direct, unambiguous evidence of specific CLEC plans and their timing submitted in the state proceeding in South Carolina. This is unsurprising; the SCPSC did not attempt to obtain a full factual record on CLEC entry. The SCPSC staff served interrogatories on only BellSouth. The staff did ask BellSouth questions concerning the level of facilities-based activity in South Carolina.[95] However, BellSouth's single response was confused and vague:

> As of April 30, 1997, [in South Carolina] BellSouth had not received any orders for unbundled network elements from any CLEC; however, there may be one, or more, CLEC(s) providing local exchange services over their

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94 See Br. at 11-15.

95 The SCPSC staff did not define the phrase "own facilities" for Section 271 purposes and the term had not been defined by the FCC when BellSouth responded to the interrogatories. Michigan Order at ¶ 94 ("[W]e conclude that the only logical statutory interpretation is that unbundled network elements purchased from a BOC are a competing provider's 'own telephone exchange service facilities.'") This fact only further detracts from the reliability of the SCPSC's fact-finding process.

> own facilities. Competitive local exchange services are currently being offered in South Carolina primarily on a resale basis.[96]

It strains credulity to believe that BellSouth did not know whether it faced facilities-based local competition in South Carolina. This is an issue in which the company's management and shareholders have an extremely strong interest. At the very least, any carrier providing competitive local service over independent facilities would have to interconnect with BellSouth to terminate calls to BellSouth's customers. Such interconnection would obviously have drawn the incumbent's full attention. One must also wonder what BellSouth meant by the statement that local service was currently being provided "primarily" on a resale basis. This statement indicates that some competitive local service was provided on some other basis.

Notwithstanding the insufficiency of BellSouth's interrogatory response, the SCPSC did not follow up with further interrogatories to BellSouth or to CLECs. The SCPSC could presumably have required other carriers subject to its jurisdiction that may have access to information regarding the future of local competition in South Carolina to participate or at least to respond to interrogatories. BellSouth at times urged the PSC to do just that.[97]

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[96] BellSouth Telecommunications, Inc.'s Responses to SCPSC Staff Data Request No. 1, SCPSC Docket No. 97-101-C at Item No. 2 (May 16, 1997).

[97] See Varner Test., SCPSC Vol. 1 at 40 ("To fulfill its role in the process of granting interLATA authority to BellSouth,

Indeed, BellSouth's Brief contain perhaps the best evidence that the findings of the PSC are unreliable. BellSouth professes still not to know whether facilities-based competition has begun to develop in South Carolina. The BOC even concedes that "[i]t is even possible that CLEC(s) in South Carolina have begun to offer facilities-based service to residential as well as business subscribers in South Carolina in recent weeks . . . ."[98] In fact, far from supporting its view that the SCPSC's findings should be deferred to by the Commission, the Brief invites the Commission to "get to the bottom of the matter."[99] The Brief further states that nine CLECs have signed interconnection agreements with BellSouth, have sought state certification, and have indicated an interest in providing facilities-based local service in South Carolina.[100]

2. Any Ambiguity Must be Resolved By Reasoned Analysis of Both CLEC and BOC Conduct and Market Conditions.

If CLEC intent to enter is ambiguous, the question then must be asked why competitive entry has not yet occurred. As the Department of Justice expert Dr. Marius Schwartz has explained in previous Section 271 proceedings:

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this Commission will need to gather information through surveys, data requests or any other reasonable means to answer the types of questions listed above [concerning CLEC activity in South Carolina].").

98 Br. at 15.

99 Br. at 16.

100 See Br. at 13.

> If sufficiently diverse competition fails to develop, it is important to understand why. As implied earlier, one possibility is simply lack of interest by entrants in pursuing certain entry modes in certain regions. But before reaching such a conclusion, it is important to ascertain that competition is not being stifled by artificial barriers. Thus, if sufficient competition fails to develop, there should be a rebuttable presumption that this is not due to lack of entrants' interest, but to a failure to irreversibly open the local market. Rebutting this presumption requires ascertaining that the main elements of an open market indeed are in place.[101]

As Dr. Schwartz further explained, "the most important elements" in determining that the local market is open are that (1) "[n]ew technical and operational arrangements must be available and shown to be working to support all three modes of entry," (2) "[p]rocompetitive pricing of these key inputs", and (3) the elimination of any "lingering major state regulatory or other artificial barriers."[102]

There can be no question that the factors listed by Dr. Schwartz warrant treating the instant application under Track A.

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101 See Schwartz Aff., at ¶ 21, submitted as Exh. A to the Department of Justice Evaluation in Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996, CC Docket No. 97-137.

102 Id. at ¶¶ 21-23. Of course, these factors relate both the Track A/B issue and to the public interest. As to Track A/B, they relate to (1) the initial question of whether a particular CLEC's interconnection request should trigger Track A, and (2) the subsequent inquiry into why a carrier that was, in a previous application, deemed to have made a "qualifying request" has made little progress in entering the market. The factors listed by Dr. Schwartz are also critical to the consideration of whether an application that has met the requirements of Track B should be nonetheless denied.

First, it should be emphasized that BellSouth has filed this application at a point in time too early to have realistically allowed significant entry -- even if the terms of interconnection were conducive to entry. The SCPSC did not issue its order approving the arbitrated BellSouth-AT&T interconnection agreement until June 20, and by that time BellSouth had already been pressing the SCPSC to resolve its proceeding on Section 271.[103] Timing alone would suggest itself as the reason why the agreement has not been implemented -- not lack of interest on the part of CLECs. Second, BellSouth continues to refuse to offer and provide critical interconnection arrangements in South Carolina. The arrangements it has deemed to offer often cannot support competitive entry on a viable commercial scale.

Such refusals to deal have slowed down ACSI's entry.[104] They have also slowed down AT&T's entry. AT&T has appealed the SCPSC's arbitration order for the BellSouth-AT&T interconnection order. That appeal deals with such fundamental issues as BellSouth's refusals to offer contract service arrangements at the wholesale discount and the level of the wholesale discount in South Carolina.[105]

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[103] BellSouth filed its Notice of Intent to File an Application Under Section 271 on April 1, 1997. See SGAT Order at 2.

[104] See Falvey Test., SCPSC Vol. 7 at 341-342, 358-359 (explaining that inadequate OSS for unbundled loops has hurt ACSI's ability to expand its entry).

[105] See AT&T Complaint.

Moreover, the lack of any stable prices in South Carolina makes entry very difficult to plan. The absence of any OSS prices in the most obvious example of this problem. Indeed, in light of the 8th Circuit's recent decision on UNE combinations, it is critical that CLECs know the level of nonrecurring charges for recombining UNEs. This is especially so given BellSouth's history of imposing unreasonably high NRCs to resist competitive entry.[106]

Second, while many of the prices that do exist in South Carolina do not appear to be prohibitively high, they are nonetheless interim and have no basis in cost. As mentioned, one critical exception to the generally low UNE prices is the price for unbundled loops. The price in both the SGAT and in interconnection agreements generally for 2-wire loops is $18.00.[107] Yet, as James Falvey, ACSI's vice president for regulatory affairs, testified in the SCPSC's Section 271 proceeding, "BellSouth's residential retail price is $16.45. Obviously, *since the BellSouth unbundled price to ACSI exceeds BellSouth's residential retail prices,* ACSI -- or any other competitive carrier -- has no prospect of providing service in

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106 Notice of Formal Complaint, American Communications Services, Inc., v. BellSouth Telecommunications, Inc., FCC File No. E-96-20 (Mar. 8, 1996).

107 See Varner Aff. at ¶ 86; see, e.g., BellSouth-AT&T Interconnection Agreement, Att. A at 2; BellSouth-ACSI Amendment to Agreement.

the residential market at competitive rates."[108] Disproportionately high unbundled loop prices seem to be at least in part caused by the fact that BellSouth's UNE prices are not geographically deaveraged. The distortions caused by geographically averaged UNEs makes business planning and entry much more difficult. As Mr. Falvey observed in his SCPSC testimony, "[o]nce market participants have available cost-based residential loop rates -- which necessarily include deaveraged unbundled loop rates -- they can determine whether residential competition is economically feasible."[109] In light of this observation, it should come as no surprise that no CLEC has ordered unbundled loops in South Carolina. Moreover, the absence of such orders is plainly not due to a lack of interest on the part of CLECs.

BellSouth states that South Carolina's system of internal subsidies (averaging across geographic areas and services) justifies the failure to have geographically de-averaged pricing for UNEs. As Alphonso Varner explains, "deaveraging, without concomitant rate rebalancing, simply creates another opportunity for CLECs to engage in arbitrage of the pricing schedule."[110] Thus, BellSouth essentially argues that its pricing can only support efficient entry once the state subsidy scheme (an example

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108 Falvey Test., SCPSC Vol.7 at 333 (emphasis in original).

109 Id.

110 Varner Aff. at ¶ 39.

of Dr. Schwartz's third factor) is rationalized. It is hard to see how, in such an environment, the presumption in favor of Track A should not apply.[111]

3. The SCPSC's Conclusions Are Not Entitled to Deference.

BellSouth relies heavily on the SCPSC's finding that "none of [BellSouth's] potential competitors are taking any reasonable steps toward implementing any business plan for facilities-based local competition for business and residential customers in South Carolina."[112] However, the manner in which the state commission conducted its review of the Track A/B issue makes both its fact-gathering process and its conclusions unreliable. As mentioned, the Commission has found that it will pay the deference due to state commission findings under Section 271(c). In this case, the "findings" deserve no deference.

First, the PSC did not engage in comprehensive fact-gathering and as a result a questionable and confusing record was created, as discussed in detail above. Second, it appears that the PSC may have applied the wrong definitions in concluding that

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111 As the Commission has recognized, treating a BOC's application in a particular state under Track A is far from an irreversible decision. See Oklahoma Order at ¶ 58. For example, if an application were denied as insufficient to meet the requirements of Track A (and Track B were unavailable), the Commission can reevaluate whether the BOC has successfully rebutted the presumption in favor of Track A in a future application.

112 See Br. at 8 (citing SGAT Order at 19).

no "facilities-based" competitive entry was likely. The SCPSC Order was released on July 31, 1997, prior to the release of the Michigan Order. As such, the FCC had not yet clarified several legal issues central to any decision whether a Section 271 applicant may proceed under Track A or Track B. For example, the SCPSC could not have known prior to the adoption of its Order that "own facilities" includes services offered over unbundled network elements leased from the incumbent LEC, nor could it have known that a single provider need not offer both residential and business facilities-based services to satisfy Track A. As such, the SCPSC, through no fault of its own, was neither able to ask the correct questions nor to elicit the appropriate responses from BellSouth or potential facilities-based competitors.

Third, the PSC's refusal to reject the use of Track B is inconsistent with fundamental national policy. Track B applies only as a fallback -- when the conditions specified by Congress obtain such that one may fairly conclude that competitive entry is unlikely to occur in a given state. In contrast, measuring Section 271 applications under Track A would "further Congress' goal of introducing competition in the local exchange market by giving the BOCs an incentive to cooperate with potential competitors in providing them the facilities they need to fulfill their requests for access and interconnection."[113] As the

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[113] Oklahoma Order at ¶ 28 (explaining why a "qualifying request" may come from a potential provider of competitive local service and need not come from an operational carrier).

Commission has found, "the legislative history surrounding section 271(c)(1)(A) establishes that, consistent with its goal of developing competition, Congress intended Track A to be the primary vehicle for BOC entry in section 271."[114]

III. BELLSOUTH HAS FAILED TO DEMONSTRATE COMPLIANCE WITH THE SEPARATE AFFILIATE SAFEGUARDS OF SECTION 272.

In addition to their other shortcomings, the affidavits submitted with the Section 271 application raise serious concerns about BellSouth's commitment to the Commission's non-discrimination standards. BellSouth insists that only its conduct in the future must comply with the structural separation requirements of Section 272 and the Commission's rules.[115] In any case, the BOC also claims to have complied in the past with these rules.[116] A closer examination of the record, however, indicates that this is not so. This fact demonstrates just how important it is for the FCC to consider the past activities of BOC applicants in light of the Section 272 requirements.

For example, the Jarvis affidavit states that BST provided switch testing and other equipment testing to BSLD.[117] Yet, the Varner affidavit indicates that BST has not provided operating,

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114 Id. at ¶ 41.

115 See Br. at 59.

116 See id. at 59-60.

117 See Jarvis Aff. at ¶ 14(c)(11) ("BST provided facilities and staff to test BSLD equipment including SCPs and Lucent #5ESS switch" at an amount totaling $42,800).

installation, or maintenance services to BSLD in connection with switching facilities.[118] These statements appear inconsistent as switch testing would seem to constitute either operation, installation, or maintenance of switching facilities.

The possibility that BST has provided services to BSLD in violation of the Commission's rules compels a closer look. The Commission's rules prohibit a BOC or BOC affiliate, other than the Section 272 affiliate itself, from performing "any operating, installation, or maintenance functions associated with facilities that the BOC's section 272 affiliate owns or leases from a provider other than the BOC."[119] These restrictions were designed to avoid discrimination in favor of a BOC's 272 affiliate.[120] Sprint has provided reason to withhold confidence in BST's assurances of compliance with nondiscrimination obligations. When BST's assurances of compliance appear contradicted by its affiliate's statements, the Commission is presented with occasion to inquire further.

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118 See Varner Aff. at ¶ 238.

119 47 C.F.R. § 53.203(a)(3).

120 See Non-Accounting Safeguards Order at ¶ 158 (noting that operational independence is required "to protect against the potential for a BOC to discriminate in favor of a section 272 affiliate in a manner that results in the affiliate's competitors' operating less efficiently . . .").

IV. BELLSOUTH'S APPLICATION IS INCONSISTENT WITH THE PUBLIC INTEREST.

BellSouth has made plain that it is using this application as a mere vehicle to plea its case in the press, and to a lesser extent, to see if it can get an accidental win by an underinformed appellate court. Rather than invest in the necessary changes to implement the legislative directives of the 1996 Act, BellSouth has chosen to incur legal fees. As explained, its application openly acknowledges its noncompliance with a variety of requirements with which it disagrees. This makes the FCC's public interest determination simple: BellSouth has steadfastly refused to comply with the very legal requirements which the FCC has found critical to the public interest in promoting local competition. As advocated early on in AT&T and LCI motion to dismiss, the Commission should summarily dismiss the application without the need to discern and evaluate other public interest implications that may obtain.

More broadly, Congress determined that no BOC should be allowed entry into the interLATA market within its region until it has relinquished its monopoly stranglehold over the local exchange markets on a state-by-state basis. Since this has not been done in South Carolina, it would violate the public interest to permit BellSouth in-region, interLATA relief in that State. To allow BOC entry prematurely would forego the anticipated benefits that flow from local telephone competition, and would